***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S APPENDIX

76-7362

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

BARBARA DAVIS, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

- against -

HONORABLE FRANK A. GULOTTA, as Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department; HONORABLE JOHN D'APRICE, as Judge in the Traffic Part of the City Court of Yonkers; PATROLMAN MATTHEW WALSH, as the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York; on behalf of themselves and all others similarly situated; Presiding Justices of the Appellate Divisions of New York State Supreme Courts, all othe similarly situated Judges and Hearing Officers hearing traffic infraction charges in the State of New York, and all other similarly situated persons through whom traffic infraction proceedings are brought by the People of the State of New York,

Defendants-Appellees.

----------X

UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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P/S

PLAINTIFF-APPELLANT'S APPENDIX

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Counsel for Plaintiff-Appellant

## INDEX TO APPENDIX

JUDGE STEWART

united states district court
southern district of new york

74 CIV. 3631

barbara davis petitioner
against
hon frank gullotta hon john d aprice and all the judges of the city court of yonkers ; respondents

the petitioner being duly sworn deposes and says;
that she is the petitioner in this actionand in support of her application to proceed in forma pauperis without being required to prepay fees or costs states as follows;

I. that she is a citizen of the united states;
2 that petitioner receives $137.20 a month from the s.si. federal public assistance and because of her poverty she is unable to pay the costs of said suit or action
3 that she is unable to give security for the sa me.
4that this action is brought for violation of petitioners civil rights under the constitution of the united states.

[signature]

sworn to before me this 14 day of august I974

state of new york ss;
county of bronx

barbar davis being duly sworn deposes and says that she is the petitioner in this action that she has read the foregoing petition andknows the contents thereof that the sa me is true to dependents own knowledge except as to those matters therein stated to be alleged on information and belief and to those matters dependent believes it to be true

[signature]

sworn to before me this 14 day of august I974

[signature]

ALBERT DUNKLEY
NOTARY PUBLIC, State of New York
No. 03-4515165
Qualified in Bronx County
Commission Expires March 30, 1976

BEST COPY AVAILABLE

united states district court
southern district of new york

barbara davis petitioner
against
hon frank gullotta ;hon john d aprice
and all the judges of the city court of yonkers
respondents

parties

barbara davis a black receipent of s.s. i. federal public assistance

hon frank gulotta presiding judge of the second judicial dept appellate division responsible on information and belief for the administration of all the courts in the second judicial dept. hon john d aprice a judge of the yonkers city court; the other defendants the judges of the yonkers city court who have trial jurisdiction if petitioners case is placed on their trial calender.

jurisdiction.

jurisdiction is invoked pursuant to 28 usc I343(3) and 4 220I 228I 2284 42usc I98I et seq 42 USc I983 the civil rights act of I866 and the 6th and I4 th amendments.

petition

I. petitioner barbara davis was arrested on june 3 I974 in yonkers new york.

2.she was charged with driving while intoxicated section II92 subd 2&3 of the vehicle and traffic law of new york state an unclassified misdeamonor punishable upon conviction by a sentence of up to a year in prison.;said charge is pending in the yonkers criminal court.

3.she was also charged with drivingwithout having a license a traffic infraction 509 _( I) of the vehicle and traffic law punishable upon conviction by a sentence of up to I5 days in prison. said charge is schulded for trial in the yonkers traffic court on sept I7 I974.

4.when petitioner plead not guilty the case was fixed for trial on july 3I I974.

5.on july 3I I974 when the case was called for trial petitioner requested the respondent hon john d aprice to appoint counsel to assit in her defense.

6. judge d aprice refused to appoint counsel for petitioner.

7. petitioner then requested an adjournment to consult with counsel.

8. judge d aprice marked the proceedings final against petitioner trial to proceed on sept 12 1974 with or without counsel

9. that petitioner does not understand the rules of evidence.

Io. that petitioner does not have sufficient mental capacity to be placed on trial without the guiding hand of counsel

II. that upon conviction of being anunlicensed operator section 509 subd I of the vehicle and traffic law a traffic infraction petitioner can be sentenced to a term of imprisonment of up to I5 days in jail.

i2 upon information and belief section 60.40subd3 of the new york state criminal procedure law the state may use a conviction for unlicensed operator to prove the elements of driving while intoxicated section II92 subd 2&3 of the vehicle and traffic law of new york which petitioner upon conviction could face a sentence of up to one year in jail.

I3 that section 722 a of the county law does not provide for the assignment of counsel for traffic infractions.

722 a defention of crime

for the purposes of this article; the termcrime shall mean a felony misdemeanor ;or the breach of any law of this state or of any law;local law or ordinance of a political subdivision of this state; other than one that defines a traffic infraction for which a sentence to a term of imprisonment is authorized upon conviction thereof added 1 I965 c 878subd I

I4 that section I70.I0 subd 3 c of the new york state criminal procedure law does not provide for the assignment of counsel for traffic infractions attached herein as exhibit I.

I5. that said statutes on information & belief are in direct violation of the us supreme court ruling in argenslinger v hamlin 407 us 25.

I_6 .that 722 a of the county law andI70.I0 subd 3 of the criminal procedure law of ny state denying counsel for traffic infractions as applies to your petitioner denies her her 6th amendment right to counsel and her I4th amendment right to due process of law.

relief requested.

petitioner asks this court to converne a three judge panel and in the meantime to issue a preliminary injunction prohibiting enforcement of section 722a of the county law as applies to traffic infractions and section I7o.IOsubd3 (c) of the criminal procedure law as applies to traffic infractions in that these laws donot allow for the assignment of counsel.

pending determination of this motion let all proceedings be stayed against petitioner in yonkers traffic court;

a for the following reasons

the actions and threatened actions of defendants as aforesaid will deny petitioner her 6th amendment right to counsel and her I4 th amendment right to due process of law.

unless this court restrains said void invalid and unconstitutional actions petitioner will suffer and continue to suffer serious immediate and irreperable harm

the issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but it will prevent irreparble injury to petitioner.

wherefore petitioner prays that upon filing of this complaint the court advance this case on the docket and order a speedy hearing of same and upon said hearing the court.

issue a permanent injunction enjoining defendants and each of them their agents employees and successors and all persons in active concert with them from enforcing 722a of the county law as applies to traffic infractions and section I70.IO subd 3 c of the ny criminal,procedure law as applies to traffic infractions and to issue a declaratory judgment that the aforesaid sections of law are unconstitutional

respectfully submitted
barbara davis petitioner pro se;
send c/o abraham davis
II0 07 73 rd
forest hills ny

# PART TWO—THE PRINCIPAL PROCEEDINGS

## TITLE H—PRELIMINARY PROCEEDINGS IN LOCAL CRIMINAL COURT

### ARTICLE 170—PROCEEDINGS UPON INFORMATION, SIMPLIFIED TRAFFIC INFORMATION, PROSECUTOR'S INFORMATION AND MISDEMEANOR COMPLAINT FROM ARRAIGNMENT TO PLEA

Sec.



exhibit I

## § 170.10 Arraignment upon information, simplified traffic information, prosecutor's information or misdemeanor complaint; defendant's presence, defendant's rights, court's instructions and bail matters

1. Following the filing with a local criminal court of an information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint, the defendant must be arraigned thereon. The defendant must appear personally at such arraignment except under the following circumstances:

(a) Where the only offense or offenses charged are traffic infractions and/or misdemeanors relating to traffic and where the procedure provided in sections eighteen hundred five and eighteen hundred six of the vehicle and traffic law is applicable and, if followed, would dispense with an arraignment or personal appearance of the defendant thereat, nothing contained in this section affects the validity of such procedure or requires such personal appearance;

(b) In any case in which the defendant's appearance is required by a summons or an appearance ticket, the court in its discretion may, for good cause shown, permit the defendant to appear by counsel instead of in person.

2. Upon any arraignment at which the defendant is personally present, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him and must furnish him with a copy of the accusatory instrument.

3. The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears upon such arraignment without counsel, he has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court if he is financially unable to obtain the same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - - - x

BARBARA DAVIS, on behalf of herself and all other persons similarly situated,

Plaintiffs,

- against -

HONORABLE FRANK A. GULOTTA, as Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department; HONORABLE JOHN D'APRICE, as Judge in the Traffic Part of the City Court of Yonkers; PATROLMAN MATTHEW WALSH, as the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York; on behalf of themselves and all other similarly situated Presiding Justices of the Appellate Divisions of New York State Supreme Courts, all other similarly situated Judges and Hearing Officers hearing traffic infraction charges in the State of New York, and all other similarly situated persons through whom traffic infraction proceedings are brought by the People of the State of New York,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - x

Civil Action No. 74 Civ. 3631 (C.E.S.)

AMENDED COMPLAINT-CLASS ACTION

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202, and Rules 23, 57 and 65 of the Federal Rules of Civil Procedure to protect certain rights, privileges and immunities secured

by the Sixth and Fourteenth Amendments and the Due Process and Equal Protcction Clauses of the Fourteenth Amendment to the United States Constitution.

2. By this proceeding plaintiff seeks, on behalf of herself and all others similarly situated, a judgment declaring that as indigent defendants unable to obtain counsel they have a constitutional right under the Sixth and Fourteenth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the assignment of counsel in traffic infraction proceedings.

3. By this proceeding plaintiff seeks, on behalf of herself and all others similarly situated, a judgment declaring unconstitutional, on their face and as applied, Section 170.10(2)(c) of the New York Criminal Procedure Code and Section 722-a of the New York County Law, as violative of the constitutional right, under the Sixth and Fourteenth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, of plaintiff and plaintiff class members as indigent defendants unable to obtain counsel to the assignment of counsel in traffic infraction proceedings.

4. By this proceeding plaintiff seeks, on behalf of herself and all others similarly situated, a permanent injunction

restraining defendants and defendant class members from proceeding against and from failing to assign counsel to all indigent defendants in traffic infraction proceedings who are unable to obtain counsel, and restraining defendants and defendant class members from enforcing, applying, or relying on Section 170.10(2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law, on their face and as applied, to unconstitutionally proceed against or deny assignment of counsel to indigent defendants unable to obtain counsel in traffic infraction proceedings.

5. Declaratory and injunctive relief are necessary and appropriate since plaintiff and plaintiff class members will otherwise suffer irreparable injury for which there is no adequate remedy at law.

6. This is a proper case for the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 in that the plaintiff herein, on behalf of herself and all others similarly situated, seeks an injunction restraining the operation, execution and enforcement of Section 170.10(2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law, on their face and as applied,

upon the ground of their unconstitutionality, by restraining the actions of defendants and defendant class members, all officers of the State, in enforcing, executing, or relying on those statutory provisions to proceed against or deny assignment of counsel to plaintiff or plaintiff class members as indigent defendants unable to obtain counsel in traffic infraction proceedings.

JURISDICTION

7. Jurisdiction over this suit is conferred upon this Court by 28 U.S.C. §1343(3) as an action to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the United States Constitution.

CLASS ACTION ALLEGATIONS

A. Plaintiff Class

8. Plaintiff brings this action as a class action pursuant to Rule 23(a) and, in addition, Rule 23(b)(2) or, in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

9. The plaintiff class is composed of all indigent defendants in traffic infraction proceedings in the State of New York who are unable to obtain counsel and who seek to have counsel assigned them as a matter of constitutional right.

10. This class action is properly brought pursuant to Rule 23 because: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class, namely, the constitutional right of indigent defendants unable to obtain counsel to the assignment of counsel in traffic infraction proceedings, and the constitutional validity of Section 170.10(2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law, on their face and as applied, in violating that constitutional right; (c) the claims of the representative plaintiff are typical of the claims of the members of the class; (d) The Legal Aid Society of New York City, attorney for the plaintiff, has legal resources and experience adequate to protect all members of the class and will fairly and adequately protect the interests of the class; (e) defendants, in proceeding against and in failing to assign counsel to plaintiff and plaintiff class members as indigent defendants unable to obtain counsel in traffic infraction proceedings, have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole; (f) the prosecution of separate

actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would create a risk of adjudications with respect to individual members of the class that might as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

B. Defendant Class

11. Defendant HONORABLE FRANK A. GULOTTA, the Presiding Justice of the Appellate Division of the Supreme Court, Second Department, defendant HONORABLE JOHN D'APRICE, a Judge in the traffic part of the Yonkers City Court, and PATROLMAN MATTHEW WALSH the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York, are representatives, respectively, of a class of defendants composed of the Presiding Justices of the Appellate Divisions of the New York State Supreme Courts, of all judges and hearing officers hearing traffic infraction charges in the State of New York, and of all

persons through whom traffic infraction proceedings are brought by the People of the State of New York.

12. This is a proper class of defendants pursuant to Rule 23(a) and, in addition, Rule 23(b)(2) or, in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the defenses of the representative defendants are typical of the defenses of the class; (d) the representative defendants will fairly and adequately protect the interests of the class; (e) plaintiffs in bringing this action have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole; (f) the prosecution of separate actions against individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the plaintiffs in this action, and would create a risk of adjudications with respect to individual members of the class that might as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

STATUTORY SCHEME

13. In New York State a traffic infraction is not deemed a crime and the punishment imposed therefor is not deemed penal or criminal punishment. §155 of Vehicle and Traffic Law.

14. In New York State a person convicted of a traffic infraction may be punished by a fine or imprisonment or both. Multiple convictions bring escalating penalties. §60.20 of Penal Law; §§1800(b) and 1180(f) of Vehicle and Traffic Law.

15. In New York State a person who pleads guilty to or is convicted of a traffic infraction is subject to suspension and revocation of his driver's license and certificate of registration. §§510 and 1807(1) of Vehicle and Traffic Law.

16. In New York State a conviction of a traffic infraction may be used to prove the elements of a subsequent criminal charge against the defendant. §60.40(3) of Criminal Procedure Law.

17. Pursuant to §170.10(3)(c) of the New York Criminal Procedure Law, an indigent defendant charged in New York State with any criminal offense, whatever the possible penalty, has the statutory right to the assignment

of counsel, except that He is specifically denied that right if he is charged with a traffic infraction or infractions only.

18. Pursuant to §§722, 722-a, and 722-b of the New York County Law provision is made in New York State for the assignment of compensated counsel for an indigent defendant charged with any offense for which a sentence to a term of imprisonment is authorized upon conviction thereof, except that §722-a explicitly excludes traffic infractions from such covered offenses for which compensated counsel is provided.

NAMED DEFENDANTS

19. HONORABLE FRANK A. GULOTTA is the Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department, and as such has administrative power over the courts in the second judicial department.

20. HONORABLE JOHN D'APRICE is a Judge in the traffic part of the City Court of Yonkers.

21. PATROLMAN MATTHEW WALSH is the police officer who arrested the plaintiff Barbara Davis and served her with a summons charging her with the traffic infraction of driving a motor vehicle without a license, and in whose

name the traffic infraction proceeding was brought against Barbara Davis by the People of the State of New York.

PLAINTIFF BARBARA DAVIS

22. Plaintiff Barbara Davis is a citizen of the United States and of the State of New York and resides in New York City.

23. On June 3, 1974 plaintiff was arrested in Yonkers, New York, by Patrolman Matthew Walsh. Plaintiff was charged by Patrolman Walsh pursuant to §509(1) of the Vehicle and Traffic Law with driving a motor vehicle without a license, a traffic infraction punishable upon first conviction by $50 fine and/or 15 days imprisonment pursuant to §1800(b) of the Vehicle and Traffic Law. Said charge was returnable in the traffic part of the Yonkers City Court. Plaintiff was also charged pursuant to §1192(2) and (3) of the Vehicle and Traffic Law with driving a motor vehicle while intoxicated, punishable upon first conviction by a fine of not more than $500 and/or imprisonment for not more than one year pursuant to §1192(5) of the Vehicle

and Traffic Law. Said charge is pending in the Yonkers Criminal Court.

24. When plaintiff pled not guilty to the traffic infraction charge, the case was set for trial in Yonkers Traffic Court on July 31, 1974. When the case was called for trial plaintiff requested defendant Judge John D'Aprice to appoint counsel to assist her in her defense, since she was financially unable to retain counsel or obtain free counsel. Judge D'Aprice refused to appoint counsel for plaintiff. Plaintiff then requested an adjournment in order to have an opportunity to consult with counsel. Judge D'Aprice marked the proceedings final against plaintiff, trial to proceed on September 17, 1974, whether or not plaintiff had counsel. The trial date was subsequently adjourned to October 1, 1974.

25. Plaintiff is financially unable to retain counsel and has not succeeded in securing counsel to assist her in defending against the traffic infraction charge. Plaintiff does not understand the rules of evidence and does not have sufficient mental capacity to defend herself at trial without the assistance of counsel.

26. If plaintiff is convicted of the traffic infraction charge of driving without a license she could be fined up to $50 and imprisoned for up to 15 days. Upon information and belief, under §60.40(3) of the Criminal Procedure Law that conviction could also be used by the State to prove elements of the criminal offense of driving while intoxicated with which plaintiff is charged in Yonkers Criminal Court. Conviction of that criminal offense is punishable by a fine of up to $500 and/or by imprisonment of up to one year.

27. On October 1, 1974, the date set for trial on the traffic infraction charge, the plaintiff appeared in Yonkers City Court, traffic part, still without the assistance of counsel. At that time, Judge D'Aprice, over the plaintiff's objection, transferred the traffic infraction case to Yonkers Criminal Court, where it is scheduled to be heard on December 27, 1974, together with the pending misdemeanor charge against the plaintiff.

STATEMENT OF CLAIMS

28. Plaintiff and plaintiff class members as indigent defendants unable to obtain counsel are entitled under the Sixth and Fourteenth Amendments to the United States Constitution to the assignment of counsel in traffic

infraction proceedings, where convictions can result in imprisonment and serious property deprivations.

29. Plaintiff and plaintiff class members as indigent defendants unable to obtain counsel are entitled under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to the assignment of counsel in traffic infraction proceedings, where convictions can result in imprisonment and serious property deprivations.

30. Plaintiff and plaintiff class members as indigent defendants unable to obtain counsel are entitled under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to the assignment of counsel in traffic infraction proceedings, where indigent defendants faced with criminal charges having less and no more serious possible consequences than traffic infraction charges are entitled under New York statutory law to assignment of compensated counsel.

31. Section 170.10(2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law are, on their face and as applied, violative of the Sixth and Fourteenth Amendments to the United States Constitution in that said statutes violate the constitutional right of plaintiff and plaintiff class members as indigent defendants unable

to obtain counsel to the assignment of counsel in traffic infraction proceedings.

32. Section 170.10 (2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law are, on their face and as applied, violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that said statutes violate the constitutional right of plaintiff and plaintiff class members as indigent defendants unable to obtain counsel to the assignment of counsel in traffic infraction proceedings.

33. Section 170.10(2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law are, on their face and as applied, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that said statutes violate the right of plaintiff and plaintiff class members as indigent defendants unable to obtain counsel to the assignment of counsel in traffic infraction proceedings while granting the right to the assignment of counsel to indigent defendants faced with criminal charges having less and no more serious possible consequences than traffic infraction charges.

## RELIEF REQUESTED

WHEREFORE, plaintiff, on behalf of herself and all the members of the class, respectfully prays that this Court:

1. Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284.

2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring that plaintiff and plaintiff class members as indigent defendants unable to obtain counsel have a constitutional right, under the Sixth and Fourteenth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to the assignment of counsel in traffic infraction proceedings, and that Section 170.10 (2)(c) of the New York Criminal Procedure Law and Section 722-a of the New York County Law are, on their face and as applied, violative of the constitutional right, under the Sixth and Fourteenth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, of plaintiff and plaintiff class members as indigent defendants unable to obtain counsel to the assignment of counsel in traffic infraction proceedings.

4. Enter a permanent injunction restraining defendants and defendant class members from proceeding against and from failing to assign counsel to all indigent defendants in traffic infraction proceedings who are unable to obtain counsel, and restraining defendants and defendant class members from enforcing, applying, or relying on §170.10(2)(c) of the New York Criminal Procedure Law and §722-a of the New York County Law, on their face and as applied, to unconstitutionally proceed against or deny assignment of counsel to indigent defendants unable to obtain counsel in traffic infraction proceedings.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiff reasonable attorneys fees and her costs and disbursements herein and also grant her and the members of the class such additional and further relief as to this Court may seem just and equitable.

Dated: New York, New York
October 25, 1974.

Respectfully submitted,

KALMAN FINKEL
The Legal Aid Society
By
JOHN E. KIRKLIN
GUY W. GERMANO, Of Counsel
The Legal Aid Society
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011
Tel.: 691-8320
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA DAVIS, on behalf of herself and all other persons similarly situated,

Plaintiff,

-against-

HONORABLE FRANK A. GULOTTA, as Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department; HONORABLE JOHN D'APRICE, as Judge in the Traffic Part of the City Court of Yonkers; PATROLMAN MATTHEW WALSH, as the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York; on behalf of themselves and all other similarly situated Presiding Justices of the Appellate Divisions of New York State Supreme Courts, all other similarly situated Judges and Hearing Officers hearing traffic infraction charges in the State of New York, and all other similarly situated persons through whom traffic infraction proceedings are brought by the People of the State of New York,

Defendants.

74 Civ. 3631

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Plaintiff Barbara Davis was arrested on June 3, 1974 and charged with driving a motor vehicle without a license pursuant to §509(1) of the Vehicle and Traffic Law (McKinney's 1970) and with driving a motor vehicle while intoxicated pursuant to §1192(2) and (3) of the Vehicle and Traffic Law (McKinney's 1970). The charge of driving without a license, a traffic infraction, punishable by a $50 fine, 15 days in jail or both, was made returnable in Yonkers Traffic Court on July 31, 1974, after plaintiff had entered a plea of not guilty. The charge of driving while intoxicated, a misdemeanor, was returnable in Yonkers Criminal Court.



12-23-75

At a hearing in traffic court on July 31, 1974, plaintiff requested the assignment of counsel, alleging that she was unable to afford to hire an attorney. The Honorable John D'Aprice then adjourned plaintiff's case to September 17, informing her that she was not entitled to counsel in a traffic infraction case and that she would have to proceed on that day with or without counsel. [Transcript of July 31, 1974, Traffic Court, Yonkers, appended to Plaintiff's Reply Memorandum of Nov. 3, 1975].

About two weeks later, plaintiff Davis, proceeding pro se, brought this action to stay the proceedings against her in Yonkers Traffic Court and to enjoin the enforcement of state statutes which prohibit the assignment of counsel in traffic infraction proceedings. On September 9, 1974, the clerk of the traffic court informed plaintiff by letter that "you have the right to the aid of counsel at all stages of this action, and if you are financially unable to obtain counsel, the Court will assign an attorney to represent you." A copy of this letter was sent to the New York State Attorney General's office. The letter also informed plaintiff that her case had been further adjourned until October 1, 1974. On that date, the case was transferred to Yonkers Criminal Court and made returnable with the misdemeanor charge on December 27, 1974.

Meanwhile, on September 11, defendants moved to dismiss this action as moot on the ground that plaintiff had been informed of her right to assigned counsel pursuant to the clerk's letter of September 9. On October 25, plaintiff, now represented in her federal action by the Legal Aid Society,



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cross-moved for an order pursuant to Rule 21 of the Federal Rules of Civil Procedure ("F.R.Civ.P.") adding plaintiff's arresting officer Patrolman Matthew Walsh as a party defendant. At the same time, plaintiff suggested that this court should refrain from ruling on the motion to dismiss until plaintiff had completed discovery. See Rule 56(f) F.R.Civ.P. Plaintiff also filed an amended complaint, expanding her case to make it a class action on behalf of all indigent defendants who are before New York courts on charges of violation of the traffic law and who are unable to obtain counsel. The amended complaint is brought against the Honorable Frank A. Gulotta, the Presiding Justice of the Appellate Division of the Supreme Court, Second Department, Judge D'Aprice, and Patrolman Walsh, as representatives of a class of defendants composed of the presiding justices of the Appellate Divisions of the New York State Supreme Courts, all judges and hearing officers hearing traffic infraction charges in the State of New York, and all other persons through whom traffic infraction proceedings are brought by the People of the State of New York.

The amended complaint seeks declaratory and injunctive relief on the ground that, as indigent defendants unable to obtain counsel privately, plaintiffs have a constitutional right under the Sixth and Fourteenth Amendments to the assignment of counsel in traffic infraction proceedings. More specifi-

only, plaintiff seeks a judgment declaring unconstitutional both facially and as applied §170.10(3)[1/] of the New York Criminal Procedure Code and §722-a[2/] of the New York County Law on the ground that those statutes violate her constitutional right to counsel. Plaintiff further seeks a permanent injunction restraining defendant class members from enforcing the challenged statutes. For the purposes of obtaining her desired relief, plaintiff requests that we convene a three-judge court, pursuant to 28 U.S.C. §§2281 and 2284.

Plaintiff has also moved for an order pursuant to Rule 37(a) compelling defendants to answer interrogatories and for an order pursuant to Rule 11 of the Local Rules of the Southern District of New York, extending plaintiff's time to move for certification of the class until 30 days after the completion of discovery.

---

1/ Section 170.10(3) of the Criminal Procedure Law (McKinney's 1971) states in pertinent part: The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears on such arraignment without counsel, he has the following rights:....
(c) To have counsel assigned by the court if he is financially unable to obtain the same, except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

2/ Section 722-a of the County Law (McKinney's 1972) relates to §722, which provides a plan for localities providing counsel to persons charged with a crime who are financially unable to obtain counsel. Section 722-a limits the definition of "crime" in §722 to "a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a 'traffic infraction,' for which a sentence to a term of imprisonment is authorized upon conviction thereof."

Before deciding whether this case requires us to convene a three-judge court and whether plaintiff's other motions are meritorious, we must first determine whether the action is moot.[3/] Defendants alleged that this action was mooted by the September 9th, 1974 letter informing plaintiff of her right to counsel in her traffic infraction case. Defendants have further suggested that on June 6th and 17th, plaintiff was informed by the court clerk of her right to have counsel assigned to her. Plaintiff disagrees, alleging that the offer of assignment of counsel related to the criminal charges pending against her and not to the traffic violation charges. Whether we construe defendants' mootness argument to fall within 12(b)(1), as a motion to dismiss for lack of jurisdiction, or as a 12(b)6 motion which, when accompanied by the filing of affidavits must be deemed a motion for summary judgment,[4/] defendants' motion must be denied. As our following discussion indicates, we do not believe that the matter is moot. Further, where there are dis-

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3/ A single judge may consider the issue of mootness because without the existence of a "case" or "controversy", no court has jurisdiction over the action. While the determination as to mootness may involve some discretion, we believe that, given the policy of construing the three-judge court statute narrowly to promote judicial economy, [Mitchell v. Donovan, 398 U.S. 427 (1970), it is for us to make this threshold decision. See also Ortiz v. Engelbrecht, 474 F.2d 977 (3d Cir. 1973) [remanding case to district judge for a determination of mootness, viability as a class, and then the necessity for a three-judge court.]

4/ Fed. R. Civ. Pro. 12(b)6. 2 A Moore's Federal Practice ¶12.09.

puted factual questions, a motion to dismiss may not be granted. Handschu v. Special Services Division, 349 F. Supp. 766 (S.D.N.Y. 1972).

In United States v. W. T. Grant Co., 345 U.S. 629 (1953), the Supreme Court held that "voluntary cessation of illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." 345 U.S. at 632 (citations omitted). Thus, even if defendants did inform Davis of a right to counsel for traffic infraction proceedings, their voluntary cessation of allegedly illegal conduct does not make the issue moot.[5/] While a "case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated," (345 U.S. at 633), here defendants have failed to indicate that the alleged wrong will not be repeated in the event that plaintiff is re-arrested and charged with another traffic infraction. New York State courts have held that there is no statutory right to the assignment of counsel in traffic infraction proceedings [People v. Farinaro, 36 N.Y.2d 283, 367 N.Y.S.2d 258 (1975)] and no requirement under the state constitution that counsel be

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5/ We note that Judge D'Aprice initially informed plaintiff that she did not have a right to assigned counsel for her traffic charge and that defendants informed her of a right to counsel only after she had filed this action. See U.S. v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968). See also, Rodriguez v. Percell, 391 F. Supp. 38 (S.D.N.Y. 1975).

assigned. [Farinaro, supra, citing People v. Letterio, 16 N.Y.2d 307, 266 N.Y.S.2d 368 (1965)]. Further, in an informal opinion letter of January 25, 1975, the Attorney General of New York State informed the Renseelaer County Attorney that "the public defendant may not be required to defend persons charged with 'traffic infractions.'" [Exhibit to letter filed by plaintiff, November 18, 1975].

The recent decisions setting forth the requisites of a live controversy when a class action is brought also suggest that the present action is not moot. In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court declined to dismiss as moot a class action challenge to Iowa's one year residency requirement for instituting divorce proceedings, despite the fact that the one year period had passed and the plaintiff had obtained a divorce elsewhere. Although concluding that the case would have become moot had the plaintiff sued solely on behalf of herself, the Court found that the controversy was not moot with respect to the class of persons she had been certified to represent. While in Sosna the class had already been certified, pursuant to Fed. R. Civ. P. 23, the Court observed that:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the

particular case and especially the reality of the claim that otherwise the issue would evade review.

Sosna v. Iowa, supra, n. 11 at 402. See Gerstein v. Pugh, 420 U.S. 103, n. 11 at 110.

The Second Circuit has applied this language to find an action not moot which, while brought as a class action, had not yet been certified as such. Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975). In Frost, the court suggested that the class certification would "relate" back to the filing of the complaint as the district judge had been prepared to grant class status earlier and the determination was deferred, by agreement of all the parties, pending a ruling on the merits. 515 F.2d at 64. The court, noting that the question of the constitutionality of Social Security Administration procedures was one which might otherwise escape review if the case were held to be moot, concluded that it was "essential" that the district court ascertain if the named plaintiff would adequately represent the interests of the class. 515 F.2d at 64.

Because the delays in the determination of the class status of the present action are a result of the motions pending before the court, we believe that any class certification granted would appropriately relate back to the filing of this complaint. Furthermore, we are confident that the named plaintiff ["or more realistically, [her] counsel" 515 F.2d at 64] will adequately represent the interests of the proposed

class, for she has been vigorous in her presentation of the issues thus far. Consequently, we believe that the rationale of Frost is likely to have application here. We note further that the issue of right to counsel in traffic violation prosecutions, which typically involve proceedings of relatively short duration, may be one "capable of repetition, yet evading review." Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). See Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974); Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Moore v. Ogilvie, 394 U.S. 814 (1969). See also Lugo v. Dumpson, 390 F. Supp. 379 (S.D.N.Y. 1975). Thus, we conclude that plaintiff's action is not moot and that defendants' motion to dismiss must be denied.

We turn now to plaintiff's request for a three-judge court.

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962). As the complaint clearly seeks equitable relief in the form of an injunction and a declaratory judgment, and as it seeks to have a statute of state-wide application declared un-

constitutional, our only task is to examine the complaint to determine whether plaintiff has raised a "substantial federal question." 28 U.S.C. §§2281, 2284.

The test of substantiality was recently reiterated by the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974). The Court, citing numerous of its earlier holdings, stated that a district court may only conclude that a question is unsubstantial if it is "plainly unsubstantial,...obviously without merit,...." Hagans v. Levine, 415 U.S. at 537 (citations omitted). The insubstantiality must clearly result from previous decisions which "foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Hagans at 538 (citations omitted). See also Gosby v. Osser, 409 U.S. 512 (1973).

The present issue is not so insubstantial as to warrant our refusal to convene a three-judge court. First, Argersinger v. Hamlin, 407 U.S. 25 (1972) established that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37. New York's statutory law and court decisions specifically exempt those charged with traffic violation from the right to have counsel assigned, despite the fact that a traffic infraction may be punished, under New York State's laws, by imprisonment.[6/] In addition, Argersinger left

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6/ An individual's first conviction of a traffic violation may result in a fine of not more than $50.00 and/or incarceration (cont'd)

undecided the issue of whether the Sixth Amendment requires that counsel be appointed where loss of liberty is not involved. 407 U.S. at 37. Those found guilty of traffic infractions under New York's laws may suffer both the direct consequence of loss of licensure and severe collateral consequences, including the potential for use of the conviction in examination of a defendant subsequently charged under the criminal code. [New York's Criminal Procedure Law §60.40]. Whether these consequences require the appointment of counsel or whether the statutory denial of counsel to those charged with traffic infractions is constitutional are substantial federal questions. 7/ A three-judge court is required. 28 U.S.C. §2284.

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6/ (continued)
of not more than 15 days. A second conviction within 18 months results in a punishment of a fine of not more than $100.00 and/or imprisonment of not longer than 45 days; a third or subsequent conviction within 18 months of the first is punishable by a fine of not more than $250.00 and/or imprisonment for no longer than 90 days. Vehicle and Traffic Law §1800(b).

7/ The majority in Argersinger did refer to traffic violations specifically, noting that, while most are technically termed "criminal prosecutions," only a small percentage of charges include the possibility of imprisonment. 407 U.S. at 38-39. In contrast, New York law does not label traffic infractions as criminal [see §155 Vehicle and Traffic Law] but does include incarceration as a penalty. The delineation between "criminal" and "civil" is not the critical question in making a determination of the need to have counsel assigned. As stated by the Second Circuit, when it held an individual was entitled to counsel in a contempt proceeding brought under 28 U.S.C. §1826, "...the burden of imprisonment is just as great regardless of what we call the order that imposed it." In re Di Bella, 518 F.2d 955 (2d Cir. 1975). See also Abbit v. Bernier, 387 F. Supp. 57, n. 12 at 63 (D. Conn. 1974).

Before turning to the other motions pending before us, we note that, at our request, the parties have briefed the applicability of Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue, 420 U.S. 582 (1975) to the present suit. Rather than reach a conclusion as to whether the proceedings in state court are within the ambit of Younger and Huffman and, if so, whether this action falls within the exceptions to the Younger doctrine, we believe that it is better to defer such a determination until the three-judge panel is convened. As stated by the Supreme Court, "[a] three-judge court...is normally required even if the decision is to dismiss under Younger-Samuels principles, since an exercise of discretion will usually be necessary, see...Abele v. Markle, 452 F.2d 1121, 1125 (2d Cir. 1971)..." Steffel v. Thompson, 415 U.S. 452, 457, n. 7, (other citations omitted). See also Vail v. Quinlin, 386 F. Supp. 630 (S.D.N.Y. 1975).

We turn now to the question of this case proceeding as a class action. Plaintiff's amended complaint alleges that this action is properly maintainable under Rule 23(b)(2) or 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure. Plaintiff states that the class is to be composed of all indigent defendants in New York State who are unable to obtain counsel and who seek to have counsel assigned to them; plaintiff alleges that the class is so numerous that joinder is impracticable, that all within the class share common questions of law, that

plaintiff is representative of the class, and that plaintiff's counsel, The Legal Aid Society of the City of New York, will fairly and adequately protect the interests of the class.

In October of 1974, plaintiff served interrogatories upon defendants' counsel in order to obtain information which she considered vital to show the propriety of maintaining her lawsuit as a class action and to show the justiciability of the controversy. The interrogatories were not answered within the requisite time period, because defendants' counsel believed that its motion to dismiss, filed earlier, would be granted.[3/] Plaintiff has asked us to order that defendants be compelled to answer the interrogatories, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, and further that plaintiff be granted a 30 day extension of time after the interrogatories have been answered in which to move for certification of the class. See Rule 11(A)(c) of the Local Rules of the Southern District of New York.

As we do not share the conclusion of the Attorney General's office that the case is moot, we do not believe that it is a "travesty of justice and a complete waste of time"

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8/ The Affidavit in Opposition to Plaintiff's Motion to Compel Answers to Interrogatories, ¶5, stated "[s]ince it is evident that there is no case or controversy before this Court, defendants have refused to answer...." However, defendants had not moved for a protective order. Fed. R. Civ. Pro. 26(c).

[Affidavit in opposition ¶6] to require defendants to answer the interrogatories. Further, we have reviewed plaintiff's interrogatories and believe them to be pertinent to the question of class certification. Briefly, plaintiff seeks to learn the number of people who appeared in the traffic part of the City Court of Yonkers from 1972 to the present who were without counsel and were not told of possible eligibility for the appointment of counsel. Plaintiff also requests statistical data on the number of persons with counsel and on the number without counsel who either pled guilty, were convicted, were acquitted, or whose charges were dismissed. Finally, plaintiff asks the number of instances in which traffic violation and criminal charges arose from the same incident and in which the two separately filed actions were consolidated in the criminal court.

We conclude, especially in light of plaintiff's allegations, that defendants have treated her differently in order to avoid litigating the issues presented here, and in light of her request that the action be declared a class action, that the interrogatories are "relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). We order defendants to answer the interrogatories within 30 days or to file objections to the interrogatories within 10 days of the filing of this opinion. Because we concluded that the information contained may be important to a decision

as to the numerosity of plaintiff's class and the practicality of joinder, plaintiff's motion for an extension of time to move for class certification is granted; the motion must be made within 30 days after defendants have answered plaintiff's interrogatories.[9/]

Plaintiff has also requested, pursuant to Fed. R. Civ. P. 37(a)(4) that the court direct payment to plaintiff of reasonable expenses, including attorneys fees, incurred in the prosecution of her motion to compel answer to interrogatories. Rule 37(a)(4) provides:

> "If the motion [to compel answer to interrogatories] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion... to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

The Advisory Committee notes indicate that opposition to discovery is justified where the parties genuinely dispute the

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9/ There is some controversy concerning the power of a single judge, who has determined the necessity for a three-judge bench, to decide the question of class certification. While single judges have made such decisions [See, e.g. Ortiz v. Engelbrecht, 474 F.2d 977 (3d Cir. 1973), in which the Third Circuit remanded the case to a single judge to determine the propriety of a class and the question of mootness before deciding whether a three-judge court was needed, and Torres v. New York State Department of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970), where a single judge determined mootness and class questions before reaching the three-judge court decision], it has been suggested that the better practice is to leave resolution of class status to the three-judge bench. See the Hon. L. Nielson, "Three-Judge Courts: A Comprehensive Study", 66 FRD 495, 512 (1974). As we have determined that plaintiff's request for an extension of time in which to move for class certification is meritorious and have granted the extension, the motion for class certification will be before the three-judge panel.

necessity for responding. 4A Moore's Federal Practice ¶37.01[8]. Here, defendants moved to dismiss plaintiff's complaint on the grounds of mootness. We believe that the motion was not frivolous and that the subsequent refusal of defendants to answer the interrogatories before their motion was decided was also reasonable. While we disapprove of defendants' total failure to respond or to move for a protective order pursuant to Fed. R. Civ. P. 26(c), we do not believe that such failure requires the sanction of the award of expenses. See Harlem River Consumers Cooperative, Inc. v. Associated Growers of Harlem, 54 F.R.D. 551 (S.D.N.Y. 1972). Cf. White v. Beloginis, 53 F.R.D. 481 (S.D.N.Y. 1971).

We turn finally to plaintiff's request that we permit amendment of the complaint to add patrolman Matthew Walsh as a party.[10/] Rule 21 permits a court to add parties "on such terms as are just." As plaintiff has alleged that Patrolman Walsh, a police officer in the Yonkers City Police Department, was the officer who arrested plaintiff, we believe that he is a proper party and may be added as a party defendant. Plaintiff's motion to amend the complaint is granted.

To summarize our conclusions, we deny defendants' motion to dismiss. Plaintiff's motions to convene a three-judge court, to compel answer to interrogatories, and to extend the time to move for class certification is granted. Plaintiff's

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10/ A single judge has the power to determine whether a complaint may be amended. See, e.g. ACLU of Md. v. Board of Public Works, 357 F. Supp. 877 (D. Md. 1972) [single judge may consider and decide questions of standing and of nonjoinder of necessary parties].

motion for an award of costs and attorneys' fees for its expenses in moving to compel answers to interrogatories is denied.

SO ORDERED.

Charles E. Stewart, Jr.
United States District Judge

Dated: New York, N. Y.
December 23, 1975.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BARBARA DAVIS, on behalf of herself and all other persons similarly situated,

Plaintiffs,

v. : 74 Civ. 3631

HONORABLE FRANK A. GULOTTA, a Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department, et al.,

Defendants.

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New York, New York
April 29, 1976 - 3:00 p.m.

Before:

MURRAY I. GURFEIN, Circuit Judge
CHARLES E. STEWART, JR., District Judge
THOMAS P. GRIESA, District judge

Appearances:

JOHN E. KIRKLIN, ESQ.
GUY W. GERMANO, ESQ.
Legal Aid Society, Civil Division
Attorneys for the Plaintiffs

LOUIS J. LEFKOWITZ, ESQ.
Attorney General, State of New York
CARL SAKS, ESQ.
Deputy Attorney General
Attorneys for the Defendants

DAVID DAVIS,
Pro se, appearing for Mrs. Davis



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(In open court)

JUDGE GURFEIN: We will call the case of Barbara Davis against Gulotta, et al.

Who is for the plaintiff?

MR. GERMANO: My name is Guy W. Germano.

THE COURT: We have read these breifs in extenso, and there are many of them, and my colleagues warrant as well that they have read the cases that are really relevant so that you can cut your oral argument down pretty well.

How much time did you ask for?

MR. GERMANO: We asked for no specific amount of time.

JUDGE GURFEIN: Why don't I give you fifteen minutes, and that will give you a good start.

Who else is appearing?

MR. SAKS: I am appearing for the State. Fifteen minutes would suffice for me.

JUDGE GURFEIN: That is too much for the State. We will give you ten minutes.

Who are you?

MR. DAVIS: I'm the plaintiff's husband. Judge Stewart gave me persmission to argue.

JUDGE GURFEIN: Are you an indigent?



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MR. DAVIS: Yes. I was before you years ago. I don't know if you remember me. You agreed with my contentions in a civil case and gave me a CJA lawyer under a 1443 action..

JUDGE GURFEIN: Well, I will give you five minutes.

MR. DAVIS: Ten would be fine.

JUDGE GURFEIN: Ten maybe, but not more. I am warning you now, so don't tell me later I cut you off.

We have read the briefs and all we want to do is be pinpointed to the important issues.

You may proceed for the plaintiffs, Mr. Germano.

MR. GERMANO: Yes, your Honor. I would like to reserve five minutes of my time, if that is possible.

JUDGE GURFEIN: What?

MR. GERMANO: I would like to reserve a few moments of time to reply.

JUDGE GURFEIN: Yes.

MR. GERMAN: The plaintiff here by a complaint and her motion for summary judgment and supporting papers moves before this Court for an order from this Court for this action to be maintained as a class action; an order challenging statutes insofar as they deny to plaintiff's class and the named plaintiff their Fourteenth and Sixteenth



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right to counsel for traffic infraction proceedings

an order for injunctive relief against defendant

lasses insofar as they prosecute the plaintiffs without

ounsel and in reliance on the challenged statutes.

JUDGE STEWART: Mr. Germano, we know about the case. We have some questions in our mind.

Do you mind if I interrupt your argument and ask a question?

MR. GERMANO: Yes, your Honor.

JUDGE GURFEIN: Why doesn't Younger v. Harris prevail here?

MR. GERMANO: Your Honor, the plaintiffs have shown, I think, in their brief to this Court, that the doctrine of Younger v. Harris is only applicable insofar as there is a pending action, a pending action in a state criminal proceedings.

JUDGE STEWART: Which there is here.

MR. GERMANO: There is no pending proceeding against Davis in New York Traffic Court at this time.

JUDGE GURFEIN: Why not?

MR. GERMANO: Your Honor, after the plaintiff -- I trust you are all familiar, I know you are all familiar with the facts of the case.

Her case was transferred over to the criminal

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part and in the criminal part where her traffic infraction case was then joined with her driving-while-intoxicated case, she is entitled to counsel.

JUDGE GURFEIN: Isn't that pending?

MR. GERMANO: That is pending. We do not challenge that proceeding.

JUDGE GRIESA: Why is there a case and controversy as far as the traffic court problem?

MR. GERMANO: When this case was first brought, Mrs. Davis had cases pending in both parts, in the traffic part separately and in the criminal part.

In the traffic part she asked for counsel and counsel was denied, and the case at that point was not transferred over.

As we cite, and the record is appended to our 9G statement, the record of that traffic proceeding, where the judge specifically denied counsel to the plaintiff.

JUDGE GURFEIN: But she had counsel in a pending case.

MR. GERMANO: She does not. Counsel has never been assigned to her either in her criminal case or for purposes of the traffic case.

JUDGE GURFEIN: Let me go A, B, C. The case has not been dismissed.



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MR. GERMANO: No.

JUDGE GURFEIN: She has not been convicted.

MR. GERMANO: That is true.

JUDGE GURFEIN: Therefore, it is pending.

MR. GERMANO: In a criminal court.

JUDGE GURFEIN: Therefore, if it is a case pending in a criminal court, why doesn't Younger against Harris apply?

MR. GERMANO: We do not challenge the proceeding in the criminal court. Our declaratory judgment and injunction proceeding only goes to the judges in traffic cases who handle traffic cases only.

JUDGE GURFEIN: Excuse me, either that the case has been dismissed or if you say it is consolidated, then it is a pending case.

MR. GERMANO: We assert it has been consolidated. At the time this case was brought in federal court, it was pending.

JUDGE GURFEIN: What does that have to do with it?

MR. GERMANO: Under the applicable Supreme Court doctrines where a plaintiff files a class action case and subsequently is mooted out, her own case may be mooted out but that does not moot out the case of the cause.



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Stefano and Gurstein.

JUDGE GURFEIN: There were named plaintiffs in those cases. There were other named plaintiffs, weren't there?

MR. GERMANO: Not other named plaintiffs in Gurstein.

JUDGE GURFEIN: Gurstein was something like a writ of habeas corpus in effect, wasn't it? There was no state remedy in a state court in Florida.

MR. GERMANO: There is no state remendy here, your Honor.

JUDGE GURFEIN: The remedy is easy. You try a case, get convicted and take an appeal.

MR. GERMANO: As counsel has adequately pointed out in our main brief, there is no right. An indigent traffic defendant who is convicted without counsel must ask for stay in the appellate courts.

JUDGE GURFEIN: Let me cut through the thing. You want us to define the class.

MR. GERMANO: Yes.

JUDGE GURFEIN: Who is in that class?

MR. GERMANO: We maintain it consists of, number one, all persons in the future, after the effective date of this order, who take traffic infraction proceedings.

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JUDGE GURFEIN: How many of those?

MR. GERMANO: Thousands upon thousands.

JUDGE GURFEIN: Millions?

MR. GERMANO: In ten years there would be.

JUDGE GURFEIN: I am not being facetious at all. In footnote 10 of the Argersinger opinion, Mr. Justice Douglas noted in the year 1970 there was something like a million, nine hundred thousand traffic infractions in the City of New York alone.

Now, has that figure decreased substantially or is that about what we are dealing with?

MR. GERMANO: You would be dealing with a figure of something like that.

JUDGE GURFEIN: So that's not thousands. To me it is almost two million.

MR. GERMANO: In New York City there are plaintiffs who go into --

JUDGE STEWART: By the way, Mr. Germano, why do you need a class?

MR. GERMANO: A class is definitely --

JUDGE GURFEIN: I'm disrupting the argument, but why do you need a class?

MR. GERMANO: First of all, we need a class, your Honor, mainly because, aside from the fact that we



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come under Rule 23 --

JUDGE STEWART: If we find a constitutional problem here, that applies to everybody. So why do you need a class?

MR. GERMANO: We need a class because in New York State there are literally hundreds and hundreds and hundreds of local criminal courts. I personally called a few clerks around the state, and the procedures they used vary with the judge.

JUDGE STEWART: I don't see what it does for you to get a class. If this Court says and this Court's ruling is upheld in terms of how state courts ought to proceed with respect to one plaintiff, I assume it may apply across the board, at least to that kind of violation.

Now, Mr. Germano, I am taking you away from the central point.

JUDGE GURFEIN: And from my question, if I say so so. I would like an answer to the question. Who is the class?

MR. GERMANO: The class is basically all persons who would face traffic infractions -- all indigent individuals who would face a traffic infraction proceeding without counsel.

JUDGE GURFEIN: In other words, the million nine



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I am using that figure roughly. There is nobody less in the class than the million nine?

MR. GERMANO: Those who would be indigent of the million nine.

JUDGE GURFEIN: And there is no subclass you are speaking of?

MR. GERMANO: We divide it into subclasses for the purpose of analysis.

JUDGE GURFEIN: You are asking us for a certification. Whom do you want us to certify as a class? You write it out for us now.

MR. GERMANO: The class we would like certified is mentioned in our motion for summary judgment and defined. It is written out in our brief. I can give it to you, the basics.

We want a class of individuals whom there are pending proceedings in traffic infraction cases before the date of Judge Stewart's order on December 23rd, after the date of Judge Stewart's order, and then after the date of whatever order this Court could make.

JUDGE GURFEIN: Does that include a parking violation?

MR. GERMANO: To the extent they would face a jail term.



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JUDGE GURFEIN: How would you determine whether they faced a jail term?

MR. GERMANO: Or loss of their license.

JUDGE GURFEIN: Or loss of their license?

MR. GERMANO: Yes, your Honor. That is a possibility also.

JUDGE GURFEIN: And you make no distinction between major and less serious offenses; is that right?

MR. GERMANO: We make a dinstinction only insofar -- the distinction is not minor and major. The distinction should be made on what the sentence is going to be, the severity of the sentence.

JUDGE GURFEIN: The Supreme Court has said it is depending on whether it is major or some words like that. If you look at the end of the opinion -- I brought it here to see it myself again -- it says: 'Under the rule we announce today every judge will know" -- what will he know and when will he know it? -- "when the trial of a misdemeanor starts that no imprisonment may be imposed even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense, and therefore know when to name a lawyer to represent the accused before the trial begins."



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So first off the Judge has to find out whether it is serious or grave before he is out of line, isn't that true?

MR. GERMANO: My interpretation of your statement would mean where a person was going before a judge and speeding at the rate of 125 miles an hour on a crowded street, that would be a serious offense as opposed to speeding 10 or 15 miles over. That distinction can be made. The judge would know one way or the other how he was going to do it.

However, your Honor, as we have pointed out in our main brief, the rationale of Argersinger goes much further than merely right to counsel where you face a jail sentence. It also would cover instances where someone would lose their license.

An example, if I may, of our named plaintiff, our named plaintiff, had she been tried when that original case was called in Yonkers Traffic Court when she had a pending misdemeanor case in the Criminal Court arising out of the same instance, without counsel they may have proven she was driving the car and she didn't have the license.

If they proved that, the element of driving that car could have been used in the criminal proceedings,



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driving while intoxicated, to prove the misdemeanor, all that without counsel.

THE COURT: So?

MR. GERMANO: That is as serious a problem as going to jail, the fact --

THE COURT: That's what I am trying to pin you down on. You want us to include in the class all those who may not even go to jail but who may lose their licences.

MR. GERMANO: Who may lose their license. We think, your Honor --

JUDGE GRIESA: Anybody may lose their license if they are before a traffic court the first time. Isn't that right?

MR. GERMANO: I think so.

JUDGE GRIESA: They may, if they pile up enough offenses. So you want the class to include everybody even though it is a first time before the traffic court, right?

MR. GERMANO: Yes.

JUDGE GRIESA: Should all those people get lawyers because they potentially might have a second and third offense? Should they get a lawyer the first time?

MR. GERMANO: If they have a right to counsel in that proceeding they should have a lawyer.



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JUDGE GRIESA: You are arguing all of these people should get counsel?

MR. GERMANO: We do, your Honor.

JUDGE GURFEIN: Do you have any figures as to how many paid counsel appear in these types of cases?

MR. GERMANO: It is impossible to get. It is actually impossible to find out. I have tried. I have called all over and I have tried to get some of the records. It is fairly hard. No one keeps that record apparently.

In our interrogatories to the City of Yonkers Traffic Court, they did not keep that record. They said they would have to go and read all their transcripts to determine who had counsel and who didn't.

THE COURT: How many people went to jail in Yonkers in the year 1975, do you know?

MR. GERMANO: No, your Honor.

JUDGE GURFEIN: How do you know that?

MR. GERMANO: I do, however, know that 3,000 people went to jail in the State of New York for traffic infraction offenses in the year 1974.

JUDGE GURFEIN: How do you know that?

MR. GERMANO: I called Mr. Bertram and he is with -- it is in our reply.



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JUDGE GURFEIN: It is filling up fast because in 1970 in the City of New York there were only 24.

MR. GERMANO: City as opposed to the State. I'm talking about the State of New York.

JUDGE GURFEIN: The City of New York is a pretty big hunk of the State, isn't it?

MR. GERMANO: Yes, but what you find is the procedure varies. What goes on in the hinterlands might shock a federal judge's conscience. That is another reason why we need declartory and injunctive relief in this case. Without it I don't think that we would correct the problem.

JUDGE GURFEIN: Any other point you want to cover?

MR. GERMANO: Merely to point out we feel that the defendant judges are proper parties in this case and Mendez v. Heller does not apply here for the reasons --

JUDGE GURFEIN: What doesn't apply?

MR. GERMANO: The doctrine raised in Mendez v. Heller. We feel that does not apply to this case. We feel that the dicta in that case was asserting an immunity defense for state judges when no such defense can exist. No such defense ever existed at common law.

In fact the only way at common law or even in



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the relationship between the Supreme Court and the various courts, appellate courts and lower courts of the state, the only way higher courts can exercise authority over the lower courts is really through a procedure of a mandamus where they would be able to enjoin a policy or an action of a state court judge which violates the constitution of the state.

JUDGE GURFEIN: You sue only state court judges. Doesn't it trouble you that they are not really adversary parties? They couldn't care less which way we do it. How do we get a case or controversy here that's really argued by two sides?

MR. GERMANO: I think the focus is not case or controversy in that issue. The focus is really the ability of the appellate court to control what is going on in a lower court.

JUDGE GURFEIN: We are not an appellate court. We are a federal court.

MR. GERMANO: The federal district courts have been given the jurisdiction by the Congress of the United States to apply the statutes of the law of the land, and under 1983 to enforce the civil rights.

Therefore, under that grant of authority by the Congress you have the power, the authority to enjoin



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a state judge's action where his action violates the Constitution of the United States.

We are not talking about a situation where a judge acts within his discretion. Not that. Where the Constitution, the laws of this land mandate that a judge fulfill his duties and where a judge does not do that, then there is no immunity.

JUDGE GURFEIN: We will give you a chance to reply.

We will hear the Attorney General now briefly.

As I say, I remind you that we have read the briefs very carefully. Just hit the high spots.

MR. SAKS: Yes, your Honor.

Your Honor, it is my contention that Younger v. Harris does apply, and therefore this action should not be entertained by this Court.

The federal courts -- the Supreme Court has made it graphically clear that the federal judiciary should not invade the province of the state court when there are ongoing criminal proceedings.

The Supreme Court recently in Rizzo v. Good has indicated that still remains valid law.

JUDGE GURFEIN: With Mr. Rizzo there was no case pending, was there?



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MR. SAKS: No case or controversy, your Honor. However, they made it quite clear that even where you are not asking to enjoin a prosecution but only asking to enjoin a specific collateral or ancillary issue, unless certain extraordinary circumstances arise, the federal courts should not intervene.

Further, this matter has been extended in Huffman v. Persue into quasi-civil matters.

What I am suggesting is that this Court should give the state courts an opportunity to construe the statutes under attack. The New York State courts are at the moment an open forum.

As I said in my brief, the law is in flux. There is no case in New York State which is adversary to the position of the plaintiff. As a matter of fact, the only case, People v. Weinstock, decided by the Appellate Term of the Second Department, is in their favor. Therefore, theoretically if they are convicted without an attorney and if they are sent to jail, and they appeal to the Appellate Term, that would be reversed.

JUDGE GURFEIN: Who is going to handle the appeal?

MR. SAKS: They could do it themselves.

However, if they are incapable I would refer



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this Court to the Farino case. The Farino case does state where a person is incapable in a traffic infraction of handling his own appeal, that the Appellate Court in its discretion may appoint an attorney.

JUDGE GURFEIN: Let me ask you, can you stipulate for the Attorney General that if we should send this case back or refuse to do anything and she is convicted and wants to take an appeal, that you will see to it that she gets a lawyer?

MR. SAKS: I would have to consult with Mr. Samuel Hirschowitz, who is the First Assistant Attorney General, before I can make a stipulation.

JUDGE GURFEIN: That is not a very smart answer, but anyway, go ahead.

MR. SAKS: I would say that Mr. Hirshowitz would give it favorable treatment, but I can't bind him. I would recommend it be done. I don't want to bind the State. I'm pretty sure it would be done.

JUDGE GURFEIN: What is the name of that case.

MR. SAKS: People versus Farino. I would like to read from it. Perhaps that might be of some assistance:

"An uncounseled defendant in a criminal case may not be capable of assigning error, but surely a



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defendant convicted of a traffic infraction who is represented by counsel at the trial level is hardly in that position. If perchance he is that should be shown and addressed to the Court's discretion."

In other words, an attorney can be assigned. If a person is incapable of assigning error, New York has not ruled that out. It is in the case. It is very clear.

Given that fact, I just don't see why the Younger cases don't apply.

As far as the class certification, class 1, in reference to the named defendant, there is certainly an ongoing criminal proceeding. In class 2 those people who received traffic citations after Judge Stewart's decision of December 24th, there is also ongoing prosecutions by virtue of the fact of receiving a traffic ticket. That is the commencement of the proceedings in the state courts.

Class 3 is those people who will receive tickets in the future. There is no case or controfersy, they haven't been arrested, prosecuted.

JUDGE GURFEIN: In the Farino case the defendant was represented by counsel at the trial stage.

MR. SAKS: Yes, he was. If a person isn't represented by counsel he still can obtain it if he makes



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an application to the discretionary authority of the Court on appeal.

JUDGE GURFEIN: We certainly would want her to have counsel on appeal in the state court if she should be convicted.

I suggest to you very strongly that while she has competent counsel now who presumably would follow through for her, if perchance they fail, I want it clearly understood we would expect the State to see she gets a lawyer.

JUDGE GRIESA: The reason is because the Younger doctrine contemplates a competent, thorough examination of the constitutional issues in the state courts, and that can be done on appeal.

MR. SAKS: In a way the whole thing is moot because Mrs. Davis will have an attorney in the case because the matters have been consolidated.

In the criminal courts of Yonkers there is no doubt she will have an attorney. So in a real sense this matter is not really a live controversy in reference to Mrs. Davis.

Getting back to subclass 3, those people who will get tickets in the future, that is not a concrete thing. It is not a real live controversy.



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JUDGE GURFEIN: Thank you very much.

MR. DAVIS: I would like to make some comments about Mr. Saks' statements.

JUDGE GURFEIN: Five minutes.

MR. DAVIS: To start off, Mr. Saks is wrong about Farino --

JUDGE GURFEIN: Who is Mr. Saks?

MR. SAKS: That's me, your Honor.

MR. DAVIS: If your Honor read Farino, that says if the counsel in the trial court. Now, I'm familiar with Douglas v. California in which the Supreme Court in 1963 says if the state gives somebody a right to appeal for the rich, they have to give it to the poor.

New York State has violated that on various conditions. He is talking about the Weinstock case, which is pre-Farino, where they recommended in dicta that people be given assigned counsel when they are facing the possibility of imprisonment.

After Farino, I have two cases, People v. Johnny Bartkus and People versus Barry Peskin. Both of these people were tried pro se in a Suffolk court, both without counsel.

Mr. Peskin was given $25 or three days, and the other defendant was given $40 or eight days.

They appealed pro se to the Appellate Term. The Appellate Term refused to assign them counsel being that the sentence of imprisonment had passed. In other words, what New York is doing is singling out traffic infraction defendants for a different standard of treatment.

If you are convicted of a misdemeanor, whether you go to jail or not, you get a free lawyer if you are indigent on appeal.

If you are convicted of a felony you get a free lawyer whether you are sentenced to jail or not on appeal.

Also, Judge, you have to remember this woman in here is of diminished mental capacity, and she doesn't understand what is going on.

We have letters from her doctor. I have sent letters to various state judges, Judge Breitel and Judge Gulotta. I will be glad to bring the doctor down here to testify.

As your Honor talked about in Martinez, you said that Judge Gellinoff wasn't aware that Mr. Martinez was of diminished mental capacity. His clients have been aware since 1974 because on the day she was arraigned I specifically instructed the judge that she didn't understand what was going on.

To further add insults to injury to my wife, on July 31st when she appeared before the Honorable James D'Aprice, a respondent in this action, he agreed she was sick and he wouldn't do anything. The cop was ready to testify.

Also, your Honor, these cases are not consolidated as the learned Attorney General points out. Mrs. Davis is facing two separate prosecutions in Yonkers. The district attorney made a motion to consolidate the traffic infraction with the misdemeanor, and Mrs. Davis put in her pro se cases under Coleman v. Alabama, which holds that in the criminal stage of the proceedings you have to have counsel.

So the D.A. marked the motion off the calendar. As it stands now she is facing a prosecution for two separate offenses plus if Mrs. Davis takes the stand in a traffic infraction case, her testimony can be used to incriminate her in the driving while intoxicated case.

In fact, the elements of one relate to the other under People versus Cornier in the Appellate Division. They held that acquittal of one is a bar to the other, under the double jeopardy section of the New York State Constitution, Article I, Section 6. Mrs. Davis has no state remedy.

As the Attorney General talks about Younger, they say you have a state appellate remedy.

Let's take if Mrs. Davis is convicted. She is sent to jail immedia :ly. She is remanded and given 15 days, which is a very strong possibility considering she has caused the respondents a lot of trouble. I'm not saying they are being vindictive but people are human. You have to realize somebody who sits on the bench is human like you and me and anybody else.

Say she is sent to jail. Tell me, under the New York law for Mrs. Davis to get a stay, she has to first notify the district attorney and also she has to file a notice of appeal. Then she has to be brought from the County Jail to the judge who would hear this application, and being she is incarcerated would take eight days by notice of motion. As there are no state judges sitting in the County Farm, they can't sign an application. I don't think they would entertain an application for me proceeding for her because I'm not a lawyer.

The same thing in PAL versus Alabama where the justice said even the layman who knows can't defend himself without a lawyer.

She is sick --

JUDGE GURFEIN: She has a lawyer. He was



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assigned to her.

MR. DAVIS: There was no lawyer assigned to her. I have to bring that clear to the Court. She has no counsel in the two years that this prosecution has been pending. I want the Court to understand. The Attorney General is not giving you the exact facts. She has no lawyer.

JUDGE GURFEIN: Didn't the judge say he would appoint a lawyer?

MR. DAVIS: No. There is a little problem there. They have given her no lawyer in two years. She has no counsel, period.

JUDGE GURFEIN: That a serious question of fact here.

What do you say, Mr. Attorney General?

MR. SAKS: I think what happened is the clerk advised her if she was indigent an attorney would be assigned to her. This matter has been deferred pending the outcome of this proceeding. That is the only reason.

I would also like to point out that counsel in his brief indicates there has been a consolidation of this matter. So therefore we are in agreement. Only Mr. Davis apparently is in disagreement.

MR. DAVIS: I'll tell you what, Judge. I will



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be glad to bring down the district attorney's motion paper. As I say, the record speaks for itself. Counsel is not too sure. They haven't consulted me too much about the case.

JUDGE GURFEIN: Mr. Davis, please. You want assigned counsel. That's your whole point, right?

MR. DAVIS: Yes.

Also, another problem, a very serious problem. Like under New York law, if you are convicted of a misdemeanor, like, say, any misdemeanor, you are arrested for a felony, you become a multiple offender.

JUDGE GURFEIN: It has not happened yet.

MR. DAVIS: It may happen. Let me explain something to you. She hasn't been given a lawyer yet. Say she goes to trial pro se. Let me explain it to you what can happen.

If she is convicted, sentenced to jail, she serves the 15 days. Under Bartkus and Peskin she doesn't get review. They have made a slap at the Supreme Court of the United States in Douglas. In Maire versus Chicago, they say everybody who is poor is entitled to a free transcript whether or not they face the possibility of incarceration. Williams versus Oklahoma City, where they had a double standard of justice.

Another thing, Judge, arrested, she doesn't get review; where is the state remedy? She doesn't get heard on the merits. She has no remedy.

If she is convicted of a misdemeanor, whether she goes to jail or not, she is going to get appellate review. Here she doesn't get any.

If you read the Bartkus and Peskin cases carefully it will back up my contention. If she is convicted, she doesn't get review; and if she is rearrested today, speeding, and she is a second offender, or anybody in her class, she can go to jail for 90 days, and then again she appeals and has no one to make a stay, and she doesn't get no review period. It's a vicious cycle.

If you look in the pro se brief, Professor Denzer, and this is a very important point, 170.10, subdivision 3(c) says that the court doesn't have to tell anybody about their right to retain counsel. This man here, Professor Denzer, says here -- he noted that "CriminalProcedure Law 170, subdivision 3(c) will have to be amended as a consequence of Argersinger versus Hamlin because that section specifically includes the necessity to advise defendants in traffic situations of their right to counsel."

Counsel neglected to mention when the respondents

answered the interrogatories they have admitted they don't ask anybody if they can afford counsel or assign counsel. They don't tell anybody of their right. If you can't afford counsel, you don't know. Some laymen know and most don't. They don't give it to the rich or the poor.

JUDGE GURFEIN: You say you are not rich, so how does that concern you?

MR. DAVIS: The law is unconstitutional if you read Professor Denzer's papers.

Let's put it this way: A layman cannot cross-examine an expert witness, like a police officer, especially a person of diminished capacity.

JUDGE GURFEIN: I want to know does she have a lawyer?

MR. DAVIS: She hasn't.

JUDGE GURFEIN: Counsel says she has.

MR. DAVIS: He is making speculation. Let him put it in writing she is going to get one. If they don't give her one they won't sentence her to prison.

JUDGE GURFEIN: Will you put it in writing?

MR. SAKS: It was put in writing by the court clerk of Yonkers.

JUDGE GURFEIN: Affirm it on the part of the

Attorney General and the court reporter will take it down.

I will say it for you and then you say amen.

The State of New York represents that the traffic violation and the so-called criminal violation have been consolidated in the criminal court and that the criminal court judge has stated that he will assign counsel to the defendant.

MR. SAKS: I can say the clerk of the City Court of Yonkers has assured the plaintiff she will have counsel if she establishes she is indigent.

I can't speak for the court per se. I'm pretty sure this is what will happen, based on the fact it has been consolidated. There has been assurance given to her on September 9, 1974 this will happen. It was a letter sent to her. As a matter of fact, I believe Judge Stewart is conversant with the letter submitted by the Attorney General in his motion papers at that time and that offer still stands.

MR. DAVIS: I have to make a comment. That is one of their favorite tricks. I used to be with welfare rights. Everytime clients would bring actions in the district court, it is an attempt to moot out the suit. He hasn't answered the question.

JUDGE GRIESA: In this setting where the Attorney



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General's office has come before the federal district court, we are relying on the representation as an indication that if she is indigent the further proceedings -- in the further proceedings she will have a right to counsel. We are relying on that.

MR. SAKS: I would like to point out, your Honor, that this refers to the fact that the matter has been consolidated in the criminal court. I would like to point out --

JUDGE GRIESA: We understand that.

MR. SAKS: This has already been done through the court clerk on September 9, 1975. There was an assurance from the clerk --

JUDGE STEWART: '74. I take it from what you have been saying is that counsel hasn't been appointed, and I take it from what you are saying to Judge Gurfein that counsel will be appointed if this proceeding goes on.

MR. SAKS: In the criminal court of Yonkers.

JUDGE STEWART: And you will see to it that it happens.

JUDGE GURFEIN: I would like to reserve the statement and put it on the record that we are not dealing with a question of whether the consolidation is proper or not, bedause somebody raised this double jeopardy question.



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MR. GERMANO: If I may, whatever happens to Mrs. Davis in this suit at this point, what about the thousands of members of the class

JUDGE GURFEIN: That is what you are trying to goad us into, and that is what we don't want to be goaded into. We don't render advices or opinions.

MR. GERMANO: There is a case or controversy before this Court. Thousands of them, your Honor.

JUDGE GURFEIN: Let me ask you a few questions. Does she have counsel or doesn't she?

MR. GERMANO: She does not now.

JUDGE GURFEIN: Will she tomorrow?

MR. GERMANO: She may or may not whether or not you dismiss this case.

JUDGE GURFEIN: He says she will.

MR. GERMANO: We don't know what he is going to do. But that is beside the point, your Honor.

JUDGE GURFEIN: Assume hypothetically she will have counsel, then what is the case or controversy?

MR. GERMANO: We have a named plaintiff and this is a class action, and under the Supreme Court cases when you have a class action, that class is entitled to relief.

JUDGE GURFEIN: You haven't been able to define



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the class for me.

MR. GERMANO: Your Honor, we have defined the class.

MR. DAVIS: The class is every defendant that was arrested, going to be arrested, and will be arrested in the future.

Let me point this out to you, I'm not a lawyer, but this makes common sense to me.

JUDGE GURFEIN: Does that include the three of us up here?

MR. DAVIS: If you were indigent. Upstate New York they have justices of the peace who are not lawyers. They went to jail, the people up there, without a lawyer. The Attorney General hasn't said they got a lawyer. How do we know they had one? 3,000 people going to jail without a lawyer. They are making a mockery of the Supreme Court. They said nobody can go to jail without a lawyer. They are disregarding the law. What about those people?

JUDGE GURFEIN: They are not before us.

MR. DAVIS: They are members of the class or future class. What happens tomorrow if somebody else goes to jail? What happens to them?

Maybe my wife will get arrested and charged

with another traffic infraction. What are they going to do, look into it after she is in jail? They give me promises and they are not producing. They haven't given her nothing in two years.

JUDGE GURFEIN: There is a state court here, too, in New York City.

MR. DAVIS: No state remedy under Bartkus and Peskin. You serve your sentence, do the time, and no review on appeal.

JUDGE GURFEIN: If you say to the judge, "I want to appeal this case, and I have been on bail all the time"--

MR. DAVIS: How are you supposed to know if you are a layman when they don't inform you. They don't inform you. I have been in his client's court. I used to sit there and watch them. In traffic court they don't inform anybody of their rights to appeal. They don't inform anybody of their right to self-incrimination.

JUDGE GURFEIN: We have heard enough on that. Thank you very much.

You want two minutes?

MR. GERMANO: I would like two minutes, your Honor.

THE COURT: All right.

MR. GERMANO: If I may read to you from



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Justice Powell's concurrence in Argersinger, and if I may, your Honor, it was concurred in by Justices Burger and Rehnquist. In his concurrence he makes it quite clear that the right to counsel goes beyond merely where there is a jail sentence.

JUDGE GURFEIN: He makes it clear but he doesn't have a majority. I know about that.

MR. GERMANO: They are the most conservative members of the Supreme Court. I think the implication is clear. That was not before them in Argersinger.

What they were saying is the next case that comes up, the next case that comes to us the right to counsel extends. In fact it has been extended by other courts well beyond criminal cases.

JUDGE GURFEIN: But on the other hand, if Justice Douglas is the most liberal, why didn't he say it?

MR. GERMANO: The case was not before them. The right to counsel has been extended in this circuit in Vale v. Quinlan to debtor-creditor proceedings. That is not a criminal proceeding where a person could spend time in jail, in Connecticut to body execution proceedings; in California to child neglect proceedings where there is a possibility of losing your child. This right to counsel


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has been extended in this country. Under the applicable laws and under these cases the named class -- the unnamed class plaintiffs, all those person who in the future after this Court renders a decision, no matter what happens to Mrs. Davis, whether she gets counsel, all those unnamed class members are entitled to counsel under the decisions in this country.

JUDGE GURFEIN: Thank you very much.

MR. SAKS: May I have a minute, your Honor?

JUDGE GURFEIN: Just one minute.

MR. SAKS: I would like to point out that at page 64 of Justice Powell's concurring opinion he makes an example of who should have attorneys in these petty offenses. One of the classes he excludes is traffic violation people. Page 64, your Honor.

JUDGE GURFEIN: I remember that.

MR. SAKS: I would like to point out that the Supreme Court speaking in a plurality decision made the point that it is only where a person is actually sent to jail, actually deprived of liberty, is the state obliged to assign counsel to an indigent defendant.

In this case Mrs. Davis cannot go to jail on a traffic infraction charge. Judge D'Aprice, by refusing to grant her an attorney, has excluded that

possibility. In other words, where there is an alternate of a fine or incarceration, applying that rule to this case, the only thing that could happen to her is that she is fined.

JUDGE GURFEIN: Why do you say that?

MR. SAKS: Because the Supreme Court, reading from page 40 --

JUDGE GURFEIN: That is assuming that the City Court of Yonkers, whatever it is called, follows the Supreme Court of the United States.

MR. SAKS: Let us be serious, your Honor. Throughout the cases, in Schlessinger, Huffman versus Persue, the Supreme Court of the United States said they would not assume that the state courts of the United States would ignore the Supreme Court's decision.

In this case, the City Court of Yonkers has not ignored the Supreme Court's decision. On the contrary, it exercised one of the options available to it.

Now, applying it here --

JUDGE STEWART: Mr. Saks, Mr. Germano's position is he agrees with you that we shouldn't assume that the City Court of Yonkers will disregard the injunction of the Supreme Court. I take it at least a part of his point is that the City Court in Yonkers or

the justice of the peace in White Plains may not know about that and may not have had it called to that court's attention unless there is a lawyer.

MR. SAKS: The Appellate Term could correct that.

JUDGE STEWART: Of course you can correct it after the person has been in jail.

MR. SAKS: It is quite simple. All they have to do is say to the court, "I would like a stay." I cannot believe they will send a person to jail pending this.

Bartkus and Peskin cited by them is not in point. The court there denied poor persons status to people. There was no demonstration of indigency. That is the core of the case.

Where there is a demonstration of indigency you can apply for an attorney under 1102 of the CPLR, but you have to make the demonstration.

MR. DAVIS: I have one point. There was no dispute about this. I got a paper here, letter we sent to Judge Stewart, and if you read the decision, they said -- let me get it.

I have a letter sent to Judge Stewart with a copy of the decision, your Honor, where they sent Mr. Saks -- I have it right here. People versus Johnny

Bartkus, Friday, October 17th Law Journal, 1975, page 9. It says:

"Motion for poor person's relief in assignment of counsel denied. Time to perfect the appeal is enlarged to January 1976 term. Defendant being convicted of a traffic offense and not incarcerated is not entitled to poor person relief."

People versus Barry Peskin: "Motion for poor person relief and the assignment of counsel denied. That branch of the motion to enlarge the time to perfect an appeal is granted and said time is enlarged to the January 1976 term. Since defendant was convicted of a traffic infraction, Vehicle and Traffic Law 1180(d), and since having paid his fine he is no longer subject to incarceration, he is not entitled to poor person relief. Argersinger versus Hamlin, People v. Fennell."

JUDGE GURFEIN: We are familiar with it. Thank you very much.

We are going to adjourn and we will be back. Just wait. We want to discuss something.

(Recess)



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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

(In open court)

JUDGE GURFEIN: The Court is ready to announce its decision.

As we indicated at the beginning of the hearing and argument, we have read the briefs extensively and have given a great deal of consideration to this case, the importance of which we do not minimize.

There has been a sharp controversy on whether or not the plaintiff in this case, Mrs. Davis, will ultimately have counsel appointed for her if she proves indigency in what is now a consolidated action in the Yonkers Criminal Court.

We do not feel that we have enough facts at our disposal to render a meaningful decision on that subject. Therefore, for purposes of this case we will assume that Mrs. Davis will not have counsel in the proceeding that will be brought against her and that therefore the case has not become moot.

In view of the fact that the case has not become moot on the facts as we have outlined them, there is no occasion to consider whether or not persons who are allegedly plaintiffs in a class action of this kind who are not named would survive as plaintiffs if the principal and only named plaintiff were found not to be

involved in a case of controversy or in a case which was moot or in a case in which she had no standing.

I would like to point out in passing, however, that the class action problem is surely nowhere as simple as counsel for the plaintiff has made it. For if we go back to the opinion so much relied upon in the Supreme Court of Argersinger against Hamlin, 407 U.S. 25 at 40, we note the following language from the majority opinion of Mr. Justice Douglas:

"Under the rule we announced today every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed even though local law permits it unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts. The run-of-the-mill misdemeanors will not be affected by today's ruling, but in those that actually end up in the actual deprivation of a person's liberty the accused will receive the benefit of the guiding hand of counsel so necessary when one's liberty is in jeopardy."

What we gather from the holding of the Supreme Court in the Argersinger case is just that, that where you have something which is generally known as a series of

"traffic infractions," and there is a pos ibility of dividing into subcategories the various offenses comprehended therein, the local judge will have to make a determination, in the words of Mr. Justice Douglas, as to whether or not the particular offense with which the particular defendant is charged is of such gravity and seriousness as to require a lawyer.

The implication of what the Supreme Court says, it seems to us, is that if the judge misreads the case it will just be too late. If he thinks that on what he knows before he starts that counsel is not required and he later wishes to impose a jail term, the ruling of the Supreme Court in the Argersinger case will prevent just that.

Now, here we have a situation where there is a lady named Mrs. Davis who has not yet been tried, and regardless of what arguments may be made by counsel, it seems to us quite clear that she is a defendant in a pendi.g criminal prosecution, assuming you treat, as we do, the infraction of traffic laws as a criminal prosecution. We feel in this case that under the comity doctrine of Younger v. Harris, the citation of which is 401 U.S. 37, the Supreme Court has made it quite clear that the federal courts are not to interfere in pending criminal



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prosecutions, and they made it abundantly clear in Huffman against Persue, Ltd., which was decided in 1975; the citation is 9534, 1200, which we cited in the Court of Appeals in the Second Circuit of Wallace v. Kern, November 28, 1974, decided June 30, 1975, and an opinion by Judge Milligan, and there we said, and I am going to put it into the record as a quote, page 4554 of the slipsheet, which begins at 4545:

"In a recent explication of Younger in Huffman against Persue, Ltd., Mr. Justice Rehnquist, writing the majority opinion, reiterated that federal injunctions against 'the state criminal law enforcement process' could be issued only 'under extraordinary circumstances where the danger of irreparable loss is both great and immediate,' citing page 1206, quoting from Fenner against Boygen, 271 U.S. 240, 243, 1962.

I continue with Judge Mulligan's opinion:

"The Court again announced the twofold policy basis for non-intervention in state proceedings:

"1. The recognition, both congressional and judicial, that federal courts should permit state courts to try state cases and that if constitutional issues arise, the state court judges are fuly competent to handle them since they are bound by the federal Constitution under

Article VI.

"2. The traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law."

We have held a number of times, and we held again only recently in a case coming up from Connecticut, the Gold case, that where there is a right of appeal or a post-conviction remedy in the state court, that is quite sufficent because otherwise we would be running in and out of the state courts and interfering with their process.

It is easy enough to say that just because the issue is not guilt or innocence but merely whether or not a person gets a lawyer, and I say "merely" in quotes, a most important consideration that the Younger against Harris doctrine is distinguishable. We think it is not. We think there are adquate remedies in the state courts. We think there are clear rights of appeal. We think that in the event there should be some difficulty with her being let out of jail pending appeal in view of the ruling in this case and certainly in the Supreme Court's case of Argersinger, there should be no difficulty of either getting a justice of the appellate term to grant bail pending appeal or, if necessary, to bring a write of habeas corpus or the equivalent.



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Now, I'm sorry that we have to disappoint our friends who are interested in a class action, but we all think it would be untoward for us to decide the scope of the statute and its meaning as well as its constitutionality before the state courts in New York have had an opportunity to do so.

We could discuss other things, but I'm not going to, such as whether the defendants are appropriate of a class action.

It is even conceivable in this case whether a class action is necessary because a decision would be binding throughout the state in any event, and perhaps a few other matters of that kind.

We are all convinced that the way to justice in this case and to a fair constitutional determination is through the medium of the state courts, and hence we will dismiss the complaint.

JUDGE GREISA: I would like to concur in that and put one point slightly differently with all due respect to Judge Gurfein.

Judge Gurfein stated at the beginning of his opinion, I believe, that he was assuming for purposes of his legal ruling that counsel might not be appointed at the trial level of this case. In view of that statement,



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I would like to add my own statement relvant to that point.

We have had assurances from the Attorney General that if indigency was proved, counsel would be appointed. As Judge Gurfein mentioned, that has been, to some extent, contested by the other side.

From my point of view, Younger applies unless the plaintiff here could show sufficiently that she could not obtain a sufficient remedy in the state courts, which means that Mrs. Davis has the burden of showing the lack of such a remedy, and if it is relevant to that showing, the burden of showing the lack of counsel at an appropriate stage.

Now, I believe there has not been such a showing to avoid Younger, and I believe in view of the assurances given us by the Attorney General, both with respect to counsel at this stage and counsel at an appellate stage, that in one way or another there is no indication that this constitutional question will not be adquately raised in the state courts and taken care of there.

Exactly how that will be done and whether she can prove indigency and whether counsel will be appointed at the trial stage or appellate stage, I don't know. That remains to be seen.

But all I am saying is that I think the burden



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is on the plaintiff to avoid the Younger doctrine and show the inadequacy of the state procedure and that has not been shown.

Therefore, I concur in the dismissal of the case.

JUDGE STEWART: I concur in the conclusions which Judge Gurfein has reached, and I concur in his basis for reaching those conclusions.

I think I would state the significance of Younger against Harris somewhat differently from the way he has stated it, but in this case at least, as I have indicated, I concur.

JUDGE GURFEIN: The Court stands adjourned.

- - -



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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

3 Judges granted

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Stewart PRO SE

Jury demand dated

| TITLE OF CASE | ATTORNEYS |
|---|---|
| BARBARA DAVIS, on behalf of herself and all other persons similarly situated,<br><br>Plaintiffs,<br><br>- against -<br><br>HONORABLE FRANK A. GULOTTA, as Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department; HONORABLE JOHN D'APRICE, as Judge in the Traffic Part of the City Court of Yonkers; PATROLMAN MATTHEW WALSH, as the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York; on behalf of themselves and all other similarly situated Presiding Justices of the Appellate Divisions of New York State Supreme Courts, all other similarly situated Judges and Hearing Officers hearing traffic infraction charges in the State of New York, and all other similarly situated persons through whom traffic infraction proceedings are brought by the People of the State of New York,<br><br>Defendants. | For plaintiff:<br>Barbara Davis c/o Abraham Davis<br>110-07 73rd St., Forest Hills, N.Y.<br><br>John Kirklin<br>Legal Aid Society<br>Civil Appeals Bureau<br>267 W.17St,NYC10011 691-8320<br><br>For defendant:<br>Louis J. Lefkowitz, Atty. Gen'l<br>State of New York, 2 World Trade Center, NYC 10047 |

UNITED STATES COURT OF APPEALS
FILED
AUG 27 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

| STATISTICAL RECORD | COSTS | | DATE | NAME OR RECEIPT NO. | REC. | DIS. |
|---|---|---|---|---|---|---|
| J.S. 5 mailed X | Clerk | | 8/1 | FFP. | | |
| J.S. 6 mailed ✓ | Marshal | | | | | |
| Basis of Action: Civil Rights | Docket fee | | | | | |
| | Witness fees | | | | | |
| Action arose at: | Depositions | | | | | |



BEST COPY AVAILABLE

BARBARA DAVIS V. FRANK GULLOTTA, JOHN APRICE, etc. Stewart.

'74 CIV. 3727 PRO SE

| | PROCEEDINGS | Date Order or Judgment Noted |
|---|---|---|
| 7-74 | Filed Complaint and order permitting petitioner to proceed in forma pauperis w/o prepayment of fees or costs - Tenney,J. | |
| 21-74 | Filed pltfs. affdt. and request that Abraham Davis serve the summons and complaint upon the defts. Soordered, Clerk. | |
| 7-74 | Filed Summons w/true copy of order permitting petitioner to proceed in forma pauperis | |
| 2-74 | Filed defts. affdt. and notice of motion for an order to dismiss action ret. on: Sept. 23,1974. | |
| 20-74 | Filed pltfs. notice of appearance that he is now represented by: John Kiddin The Legal Aid Society Civil Appeals Bureau 267 W.17St,NYC10011 | |
| 23-74 | Filed stip. and order that the time of defts. motion to dismiss is adj. to Oct.7,1974. So ordered,Stewart,J. | |
| 7-74 | Filed stip. and order that the return date of defts. motion to dismiss is adj. to Oct. 31,1974. S o ordered,Stewart,J. | |
| 25-74 | Filed pltfs. memorandum of law in opposition to defts. motion to dismss and in support of pltfs.motion to add a party deft. | |
| 25-74 | Filed pltfs. affdt. and notice of motion for an order to add Patrolman Matthew Walsh as a party deft,etc.,ret. on: Nov. 7,1974. | |
| 29-74 | Filed pltfs. supplemental affdt. of Barbara Davis. | |
| 29-74 | Filed pltfs. interrog. to defts. | |
| 5-74 | Filed stip. andorder that the matter including all motions is adj. to Nov. 14,1974. So ordered,Stewart,J. | |
| 25-74 | Filed pltfs. amended complaint. | |
| 12-74 | Filed defts. affdt. of David Berman in oppostion to cross-motion and to add party. | |
| 12-74 | Filed defts. brief in suport ofmotion to dismiss and in opposition to cross motion. | |
| 23-74 | Filed pltfs. affdt. and notice of motion for an order compelling defts. to answer interrog. and for an order ext. pltfs. time to move for certification of theclass until 30 days after the completion of her discovery,etc. as indicated,ret. on: Dec.26,1974 at 10am. | |
| 23-74 | Filed pltfs. memorandum in support of motion to compel answers to interrog. and ext. time to move for class action determination. | |
| 24-74 | Filed defts. affdt. in opposition by David Berman. | |
| -75 | Filed pltf's supplemental memorandum in opposition to defts motion to dismiss | |
| -75 | Filed defts supplemental memorandum in support of defts motion to dismiss | |
| 03-75 | Filed pltf's R ply memorandum | |
| 24-75 | Filed MEMORANDUM #43604.,We deny defendants' motion to dismiss. Plaintiff's motions to convene a three-judge court, to compel answers to interrog., and to extend the time to move for class action certification is granted. Plaintiff's motion for an award of costs and Attorneys' fees for its expenses in moving to compel to interrog. is denied. So ordered. -- Stewart, J. m/n | |
| -76 | Filed defts notice of motion for an order purcuant to rule 9m ret. 1-20-76. | |
| 8-76 | Filed defts memorandum in support of above motion for reargument. | |
| -76 | Filed stip. and order ext. defts time to file or object to the interrog. to 1-16-76 and that if the defts do not file objections to the interrog. by 1-16-76 they will answer such interrog. by 1-26-06--Stewart, J. | |
| 6-76 | Filed defts affdvt. and notice of motion for anprotective order pursuant to rule 26(c) ret. 2-5-76. | |
| -76 | Filed defts memorandum of law in support of above motion for a protective order | |

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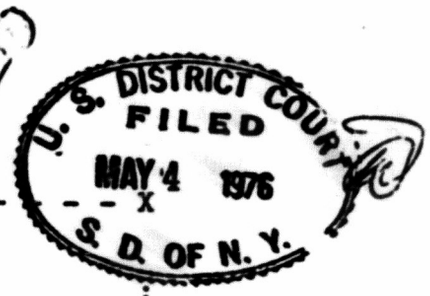
(Continuation)

| DATE | PROCEEDINGS | Date Judgment |
|---|---|---|
| [illegible]-20-76 | Filed pltf's memorandum in opposition to defts motion for reargument | |
| [illegible]-21-76 | Filed memo endorsed on motion for reargument: The motion is denied. So ordered. Stewart, J. m/n | |
| [illegible]-26-76 | Filed stip. and order ext. pltfs time to answer to 2-11-76--Cagliardi, J. | |
| [illegible]-25-76 | Filed pltf. affdvt. and cross-motion to compel pursuant to rule 37(a) ret. 2-25-76 | |
| [illegible]-76 | Filed pltf memorandum in opposition to defts motion for a protective order and in support of pltf's cross-motion to compel answers to interrog. | |
| [illegible]-27-76 | Filed John Emmett Murphy 11, Clerk of the Court of Yonkers answers to interrog | |
| [illegible]-28-76 | Filed deft. Carl Saks notice of motion for an order pursuant to rule 12(b)(6) ret. 3-15-76 | |
| 03-08-76 | Filed deft. Carl Saks brief in support of motion to dismiss the complaint as the deft. judges. | |
| 03-23-76 | Filed pltf. affdvt. and notice of motion for an order granting permission to file brief and to argue amicus curiae ret. April, 76 no date | |
| 03-23-76 | Filed pltf. memorandum of law in support of above motion to appear as amicus curiae | |
| 03-23-76 | Filed additional summons with marshals return served-- Patrolman Matthew Walsh by Carolyn Gites on 3-16-76 | |
| 03-31-76 | Filed affdvt. of Carl Saks in opposition to the application made by Washington Sq. Legal Services Inc. for permission to appear amicus curiae. | |
| 04-07-76 | Filed memo. end. on motion filed 3-23-76. Permission to file a brief amicus Curiae is granted So Ordered--Stewart, J. m/n | |
| 04-09-76 | Filed defts notice of motion for an order dismissing the complaint ret. 4-29-76 | |
| 04-09-76 | Filed defts brief in support of above motion to dismiss the pltf's complaint | |
| 04-12-76 | Filed brief by The Public Interest Law Clinic of the NY University | |
| 04-13-76 | Filed pltf's statement under rule 9 (g) supporting papers and notice of motion for class action certification joinder of party deft. summary judgment, and permanent injunction ret. 4-29-76. | |
| 04-13-76 | Filed pltf's brief in support of above motionfor class action certification joinder of party deft. summary judgment, and permanent injunction | |
| 04-22-76 | Filed deft. Walsh City Hall memorandum of law | |
| 04-23-76 | Filed defts brief in response to the pltf's motion | |
| 04-26-76 | Filed pltfs Reply brief in support of motion for class action certification joinder of party deft. summary judgment, and permanent injunction | |
| 04-22-76 | Filed stip. and order that deft. Walsh be granted an ext. of time to file his memorandum of law on or before 4-19-76--Stewart, J. | |
| 04-26-76 | Filed pltf. supplemental memorandum of law | |
| 04-29-76 | Three Judge Court convened and concluded Judg's decision:complaint dismissed Order signed and filed Curfein, C.J., Stewart, J., Griesa, J. | |
| 05-04-76 | Filed ORDER on the basis of the opinion delivered at the hearing before the three-judge panel, the complaint is dismissed. So Ordered--- Gurgein, C.J.<br>Stewart, J.<br>Griesa, J. m/n | |
| 05-27-76 | Filed plaintiff's Notice of appeal from decision and order dismissing her complaint on 4/29/76. N/M to plaintiff in c/o Abraham Davis, 110-07 73rd Rd. Forest Hills N.Y. and the Atty. General of the State of New York( mailed by Pro Se Clerk). | |
| 7/1/76 | Filed motion that orig. record on appeal + cert. + trans. to USCA this date. | |
| 06-14-76 | Filed true copy of the U.S.C.A. Order that the judgment of the U.S. Dist Court is dismissed m/n | |
| 07-[illegible]-76 | Filed true copy of U.S.C.A. order to vacate dismissal of the appeal is granted m/n | |

| | PROCEEDINGS | Date Order or Judgment Note |
|---|---|---|
| 7-76 | Filed plaintiff's letter to Judge Stewart requesting her husband to argue in her behalf. ( Received in chambers on Apr. 20-76.) | |
| 21-76 | Filed plaintiff's letter referring to case law. ( Received in chambers on Nov. 19-75.) | |
| 27-76 | Filed letter from Legal Aid Society, dated November 21-75, to Judge Stewart. | |
| 7-76 | Filed Pro Se Memorandum of Law. ( Received in chambers on Apr. 12-76.) | |

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK




BARBARA DAVIS, on behalf of herself and all other persons similarly situated,

Plaintiffs,

-against-

HONORABLE FRANK A. GULOTTA, as Presiding Justice of the Appellate Division of the New York State Supreme Court, Second Department; HONORABLE JOHN D'APRICE, as Judge in the Traffic Part of the City Court of Yonkers; PATROLMAN MATTHEW WALSH, as the police officer through whom the traffic infraction proceeding against plaintiff Barbara Davis was brought by the People of the State of New York; on behalf of themselves and all other similarly situated Presiding Justices of the Appellate Divisions of New York State Supreme Court, all other similarly situated Judges and Hearing Officers hearing traffic infraction charges in the State of New York, and all other similarly situated persons through whom traffic infraction proceedings are brought by the People of the State of New York; HUGH L. CAREY, individually and as Governor of the State of New York,

Defendants.

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ORDER

On the basis of the opinion delivered at the hearing before the three-judge panel, the complaint is dismissed.

SO ORDERED.

Murray I. Gurfein
United States Circuit Judge

Charles E. Stewart Jr.
United States District Judge

Thomas P. Griesa
United States District Judge

Dated: New York, N. Y.
April 29, 1976.

COPY OF THE WITHIN PAPER
RECEIVED

SEP 13 1976

ATTORNEY GENERAL